No. 48987-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Marriage of

TODD T. HARDIN
Respondent

and

KAREN E. LOFGREN
Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal concerns an incarcerated parent deprived of all contact with her children because of a sentencing court's erroneous order prohibiting such contact. The order was entered pursuant to Lofgren's guilty plea to second-degree solicitation to commit murder, with the intended victim being her husband, Hardin. This Court reversed the no-contact order and contemplated the question of the children's best interests would be fully addressed in the proceedings to dissolve the parents' marriage. However, before that could happen, while the criminal appeal was pending, final orders were entered in the dissolution, including a parenting plan that prohibited all contact between the mother and the children.

Upon reversal of the criminal order, the mother sought modification. Instead of conducting a full inquiry into the children's best interests, and in violation of due process and statutory requirements, the trial court limited the scope of the inquiry, denied the mother the presumption of contact to which she is constitutionally entitled, imposed on her a burden to prove contact was not harmful to the children, deprived the mother of her expert witness, and effectively terminated the mother's parental rights by ordering that contact with the children would occur only if their father determined they wished to have contact and he deemed such

contact to be in their best interests. The multiple errors are addressed below, but can be summarized simply as a failure ever to fully and fairly determine the children's best interests.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to recognize and implement the mother's constitutional parental rights.

2. The trial court erred when it imposed on the mother the burden to prove contact between she and her children would not harm them, contrary to statute and in violation of the mother's constitutional rights.

3. The trial court erred when it limited the scope of the inquiry into the children's best interests.

4. The trial court erred when it gave preclusive effect to findings entered pursuant to an apparent stipulation where doing so again limited the court's inquiry into all relevant facts necessary to a "best interests" determination. (¶2.1, ¶2.2 Parenting Plan; Finding (3)(b), ¶2.5.1, Order on Modification)

5. The court erred when it denied the mother a continuance after her expert witness became unavailable, forcing the mother to trial without the evidence she had spent months and considerable effort to

procure and leaving the trial court without the evidence it needed to make an informed decision on the children's best interests.

6. The trial court erred when it found an impairment of the bond between the children and the mother, apparently based only on the lack of contact. (¶2.2, Parenting Plan; ¶2.6, Order on Modification)

7. The trial court erred when it completely restricted all contact between the mother and the children, accomplishing an effective termination of the mother's parental rights, without evidence that any basis for restrictions reasonably related to the blanket restriction imposed. (¶3.13, Parenting Plan; Finding 3(d), Order on Modification)

8. The trial court erred with it analyzed the factors of RCW 26.09.187 without acknowledging the mother had been prohibited by the court from any contact with the children by a trial court error. (Finding 3(a), Order on Modification)

9. The trial court erred when it ordered that contact between the mother and the children would occur only if the children, aged nine and 13, conveyed a request through their father, and then only if he deemed contact to be in their best interests. (¶3.13, Parenting Plan; Finding 3(d), Order on Modification)

10. The trial court's order, drafted by the father's counsel, is a near verbatim version of the court's oral ruling, in place of findings of fact

and conclusions of law. Given its form, appellant assigns error to it in its entirety, as well as to the parenting plan. See Appendix.

11. The trial court erred when it imposed the financial costs of the guardian ad litem on the mother and awarded the father attorney fees and costs. (Finding 3(g), Order on Modification)

Issues Pertaining to Assignments of Error

1. Does a parent have a constitutional right to contact with her children, a right which is not abridged by the fact of a criminal conviction?

2. Is a parent entitled to a presumption that contact with her children is in their best interests?

3. Where an inquiry into the children's best interests had been foreclosed by an improper no-contact order, later vacated, should the court have conducted a full and fair adjudication of the best interests, rather than narrowing the scope and imposing a veritable presumption against contact?

4. Should findings entered in a parenting plan founded on a no-contact order that is later vacated be given preclusive effect and should the court enter a finding of impairment of bonds between parent and child where the mother was exiled from the children by an erroneous court order?

5. Did the court impose a total restriction on contact between the mother and the children without making the particularized finding of harm required by the statute and without finding a nexus between any harm and the restrictions and where the evidence did not establish such harm?

6. Did the court improperly delegate its authority when it placed the father in charge of any contact the children might have with their mother in the future?

7. Did the trial court abuse its discretion, including by failing to apply the correct legal standard, and deprive itself of evidence essential to a determination of the children's best interests when it denied the mother the continuance she requested when her expert witness, crucial to her case, became unexpectedly unavailable due to devastating personal events?

8. Did the court violate the statute governing appointment of the guardian ad litem, particularly given her historical and present failure to perform her duties as prescribed by law?

9. Can the court require the mother to pay 100% of the cost of the guardian ad litem because she sought time with her children, when the statute requires costs be determined according to financial circumstances?

10. After finding no bad faith on mother's part and no ability to pay attorney fees, did the court erroneously order the mother to pay a portion of the father's fees and costs?

11. Should the court remand for a new trial for a full and fair adjudication of the children's best interests, one that recognizes the mother's constitutional and statutory presumptions in favor of contact and is otherwise free of bias?

III. STATEMENT OF THE CASE[1]

1) Introduction

Lofgren and Hardin met in 1999. Lofgren was a pediatric nurse, and had worked in the Mary Bridge Hospital Emergency Department since 1993. She also did extensive volunteer work as a nurse in war zones and refugee camps. CP 323. She and Hardin married in 2002, and have two children, L.H. (born in November 2003) and R.H. (born in June 2006). CP 237.

After years of discord in the marriage, and brutal litigation over its ending, the marriage between Hardin and Lofgren ended on entry of final orders in April 2013. However, the parenting plan was not the result of an adjudication, i.e., a judicial inquiry into the highly contested facts with the

[1] RP refers to the verbatim report of proceedings for February 4, 2015 through February 10, 2015. Citations to the verbatim report of proceedings for additional hearing dates will be indicated by date in the RP cite.

benefit of testimony from multiple professionals and collateral witnesses involved. Rather, that process was usurped by the sentence imposed on Lofgren several months earlier (January 2013) following her guilty plea to second-degree solicitation for the murder of Hardin. The judge who sentenced her imposed the top of the standard range (165 months) and ordered that Lofgren have no contact with her children for life, as well as no contact with Hardin. CP 393. The parenting plan, entered several months later, cited the no-contact order as controlling, meaning the parenting plan allowed for no contact. CP 1-26.

More than a year later (August 2014), this Court decided Lofgren's appeal of the sentence; specifically, this Court vacated the no-contact order, recognizing that the inquiry into the children's best interests could not be short-circuited by the criminal conviction, since the latter does not abridge the fundamental constitutional right to the care, custody, and companionship of one's children. CP 391-401; *State v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009). Rather, any restrictions on the parent's rights must be crime-related and narrowly drawn. 165 Wn.2d at 32. This Court recognized the children were not the direct victims of Lofgren's offense nor within the same class as the victim, Hardin, and directed the family court to resolve the "matter

and manner of contact between the children and Lofgren" in the dissolution proceeding. CP 400.

2) Lofgren petitioned to modify/adjust and the court granted adequate cause, but restricted the scope of the inquiry, imposed on Lofgren the burden of proof, and presupposed (in advance of an evidentiary hearing) that contact posed a "grave risk" to the children.

Lofgren petitioned for a minor modification of the parenting plan in the trial court, pursuant to RCW 26.09.260(5). CP 37-41. The court found adequate cause to proceed with the modification petition, CP 83-85, and Hardin moved for revision. CP 84. On revision, the court agreed there was adequate cause for a minor modification, but only "for the sole purpose of determining what, if any, contact there should be between mother and children," and that "all other provisions of the parenting plan entered April 23, 2013 shall remain in full force and effect." CP 90. The court found that there was no basis to modify under the 2.1 or 2.2 provisions of the parenting plan (RCW 26.09.191) because they "basically are agreed findings and agreed limitations that were entered by this plan." 2/6/15; RP 13. The court further ordered that the "mother shall have the burden of proof as to whether contact is in the children's best interests," and found that "there may be a grave risk of psychological harm to children from Ms. Lofgren." CP 90.

Lofgren sought discretionary review, which this Court denied as failing to meet the RAP 2.3(b) criteria. See CP 119, 132-142.

3) Over Lofgren's objection and contrary to statute, the court appointed the same guardian ad litem as had served in the dissolution proceedings.

The parties' dissolution proceedings had been extremely contentious, as the docket itself attests, and included cross-allegations of domestic violence, alcohol abuse, child abuse, and abusive use of conflict. CP 317-330, 331-337; CP 342-343, 340-341; CP 288-313. In 2010, Lofgren petitioned to dissolve the marriage. The parties then reconciled and attempted counseling, but the marriage continued to deteriorate. In 2011, Hardin petitioned for dissolution. CP 317-318. A temporary parenting plan placed the children primarily in her residence. 1/11/16 RP 39. The court appointed a guardian ad litem, Rebecca Kevetter, from a list of three prospects randomly generated by the clerk. CP 289. Within months, issues arose regarding the completeness of Kevetter's investigation; the court increased her prospective fees by $1500 (from $750). Supp. CP _ (12-01-11 Order). The court also entered an order about the scope of the investigation (to include multiple cross-allegations). Supp. CP _ (12-05-11 Order).

Subsequently, Lofgren moved to discharge the GAL for bias after Kevetter interjected a religious viewpoint into her investigation (including

religious-based admonishments to the parties) and for deficiencies in the investigation. CP 344, 345-351. The religious viewpoint aligned with pronouncements Hardin was making about his beliefs. CP 353.[2] Lofgren's counsel at the time, Jeffrey Robinson, noted that "each and every attorney with whom I spoke and shared this letter expressed to me a great deal of concern that the GAL has overstepped her boundaries." CP 353. Lofgren also challenged the adequacy of Kevetter's investigation, noting she had failed to contact either of the parties, the children's therapist, or witnesses to the domestic violence Lofgren alleged Hardin committed. CP 345-47. Attorney Robinson expressed further concerns about the adequacy of the GAL's investigation, noting that she failed to speak with the children's therapist and had not read any of the pleadings in detail. He also expressed concern about her inconsistent statements to the court about her conversations with the children. CP 54, 375-76, 386.

The court denied the motion to discharge the GAL, though acknowledging Lofgren's concerns were appropriate. CP 389-390. Kevetter filed a report shortly thereafter, in February 2012, before the criminal charges. CP 288-313. In it, she cited as her authority RCW

[2] For example, Kevetter sent a letter to both Hardin and Lofgren encouraging them to resolve their conflict and included excerpts from *The Peace Maker*, a book that takes a religious approach to conflict resolution. CP 349-351,354. Her letter concluded: "This Christmas and through the coming year will you please make the choice to live your lives 'Immanuel, God with us?' Actively recognize God is with you. Make your choices accordingly." CP 351.

26.26.555 (relating to children being parties in parentage actions, which this action was not). CP 289. She recommended a 50/50 residential schedule, or, in the alternative, Lofgren as the primary residential parent with substantial residential time (2/3 weekends) with Hardin. She concluded both parents demonstrated good parenting skills, was critical of both parents, but more critical of Lofgren. CP 310.

Progress toward trial was interrupted by Lofgren's arrest in February 2012, which is the last time she saw her daughters. On July 10, 2012, Kevetter updated her report, to check in on the children's "general welfare." For this report, Kevetter met and discussed with Hardin whether the children should be in therapy, but did not meet with or discuss anything with Lofgren. Ex. 1 at 9. Kevetter did not speak to the children about their mother, despite her sudden departure from their lives; the girls became reserved when alone with Kevetter and Kevetter decided asking them any questions would exceed the scope of checking on their welfare. Ex. 1 at 9. Nor did Kevetter speak with their counselor. Id. Any and all of Lofgren's concerns about Kevetter's performance of her duties were never addressed at trial because trial was preempted by entry of the 2013 parenting plan in the wake of the sentencing in the criminal matter.[3]

[3] Further, Kevetter did not seem to know or acknowledge that Lofgren had been primary residential parent under the temporary orders. See 1/12/16 RP 191; Ex. 1; CP 290-293; Supp. CP __ (Order 7/20/11).

After Lofgren's criminal appeal, during the adequate cause hearing, Hardin's attorney asked if the court intended to reappoint Kevetter. CP 111. Lofgren objected. CP 111-112. She argued that it had been three years since this GAL was involved and noted the earlier controversy between the GAL and Lofgren's former counsel and that "this case and the children would benefit from that being toned down a bit." CP 111-112. She further noted that the last check-in report by the GAL showed that the children were not even comfortable speaking with Kevetter alone. CP 112.

The court offered that Kevetter's appointment would be "more expedient," since she has worked on the case, sparing someone else having to "go through this tortured history" and "get up to speed." CP 112. The court ordered that the GAL "investigate and report as to what contact, if any, shall occur between the mother and children, in light of the findings in 2.1 and 2.2 and the GAL's investigation." CP 91. However, the court also added that Kevetter could decide whether even to interview the children. CP 112. The court further ordered the mother to pay the GAL's retainer fee because she was "the one seeking to basically have a review of this agreed parenting plan." CP 111; CP 91. The court later denied Lofgren's motion to reconsider the appointment. CP 96-97.

The GAL filed a report in October 2015 explaining that she would interview the children (Ex. 2), then filed a report in December 2015 (Ex. 3). Ex. 3. In her report, Kevetter resolved against Lofgren a number of the disputes never litigated at trial in terms harshly critical of Lofgren, including dismissing her own previous concerns that Hardin was alienating the children (e.g., by telling them Lofgren is not their mother). See, e.g., Ex. 3 at 12-13. Kevetter acknowledged Hardin was "cocooning" the children but described him as "admirable [if] misguided." Id. Kevetter noted that neither child had received counseling since Lofgren's arrest, despite her own previous recommendations for both girls to see counselors. Ex. 3 at 4; Ex. 1 at 9. The report recounted contact with Ann Stephens, who provided therapy to L.H. "up to the time of" the arrest and who assisted Hardin in telling the girls about the arrest. Ex. 3 at 4. Stephens wanted to consult with her colleagues, including Lofgren's therapist, about therapy for the girls going forward, but Hardin would not consent to her consulting with her colleagues. Ex. 3 at 4. The report also refers to two counselors that had been recommended but who did not end up having contact with the family. Ex. 3 at 4-5; Ex. 1 at 9. The report omits that in 2012 Stephens reported no disclosures by L.H. of any mistreatment by either parent (CP 304), but mentioned the lack of negative reports regarding the father. Ex. 3 at 4. She also omitted that L.H. said

she was glad to have Stephens to talk to and to help her not be caught in the middle of her parents' conflict. CP 298-300.

The GAL did not interview Lofgren. 1/12/16 RP 176. The only other persons interviewed were the children and school personnel. Ex. 3 at 2-3. Both children, now aged 12 and 9 expressed to Kevetter a desire for no contact with Lofgren. Ex. 3 at 11-12. The GAL recommended that contact with Lofgren was to occur only if the girls desired contact, leaving it to Hardin to assist them if "possible." Ex. 3 at 13. Likewise, the GAL recommended counseling only if either girl "suggests a desire for a therapist or counseling," again with Hardin to assist them with that. Ex. 3 at 13.

4) Lofgren hired an expert, but she became unavailable just before trial due to a family medical crisis.

Within two months of the court's adequate cause ruling, Lofgren disclosed Sonja Ulrich, MSW, as a potential expert witness. CP 183. Ulrich has extensive experience in child welfare, including children's reaction to trauma, how children are interviewed, and setting up visitation plans that protect children; she has testified in several trials, and was referred to Lofgren by Northwest Justice Project. CP 183, 189.

Ulrich conducted an investigation, prepared a report, and appeared at a deposition on December 21, 2015, in response to Hardin's subpoena. CP 183. Ulrich was expected to offer testimony critiquing the GAL's

recommendation that the children not have contact with their mother unless they request it. CP 184; see, also, CP 183, Ex. 3 at 11 (12-7-15 GAL report; the GAL's report dismissed Ulrich's report as having "no relevance to this matter"). Some ten days later, an unexpected and life-threatening medical crisis afflicted a member of Ulrich's immediate family, which she described as a "devastation," rendering her unavailable for anything but tending to her family's needs for at least six to nine months. CP 187. In a declaration, she informed the court that she is "no longer available to provide any services in this case, including being able to testify at trial." CP 188.[4] Trial was to start a week later, on January 11.

Immediately, Lofgren informed the court and requested a continuance based on this extraordinary circumstance. CP 182-187; 1/8/16 RP 2. As her counsel observed, Lofgren's expert was essential to her ability to critique the adverse position taken by the GAL. CP 184; 1/8/16 RP 3-4, 12-13, 15-16. The continuance would not alter the status quo and Lofgren had not requested any continuances. 1/8/16 RP 4. Hardin had been granted a continuance of the trial date from August 2015, to January 2016, to accommodate his counsel's schedule. CP 124-127.

[4] This medical emergency came on the heels of Ms. Ulrich's home being flooded, taking several days for the water to subside and resulting in significant loss of personal property. As stated in her declaration, her family member's critical illness prevented her from returning work. CP 188-89 ("As a result of the most recent devastation to my family, I am unable to work and will not be returning for the near future.").

Lofgren did not oppose the request, but objected to the length requested. CP 128-129. The court granted Hardin's motion. CP 402-404.

Despite this history, Hardin objected to Lofgren's request on the basis of "abuse of process," noting that Lofgren had also moved for discretionary review of the adequate cause determination. 1/8/16 RP 8-9; see also 1/8/16 RP 10-12 (referring to Ulrich's current circumstances as "a number of lemony snicket unfortunate circumstances," arguing that this was "not Mr. Hardin's problem"). The GAL also weighed in, stating that delaying the trial "continues to emotionally abuse these children," who are waiting on a trial to decide whether they should be forced into therapy, adding, "I don't know what an expert can tell you by reading my report that you can't figure out all on your own." 1/8/16 RP at 13.

The court denied the continuance, holding that PCLR 40(g)2(b) requires "extraordinary circumstances" for a continuance after the deadline has passed. (The text of the rule is included in the argument section.) The court declared "there are no extraordinary circumstances," "[t]here is no basis for a new expert witness for Ms. Lofgren," and that "continued conflict damages children." CP 195. Lofgren was forced to proceed to trial with only her testimony and her sister's testimony.

At trial, Hardin testified that he believed "any kind of contact" with Lofgren, including sending a simple card, "could cause a great harm

to [the children] as far as their psyche, you know in their schooling." 1/11/16 RP 95. As he explained it, "it's just something that they have taken the time to work past and they are past it and they don't want to go back." 1/11/16 RP 95. He further testified that he declined the school counselor's invitation for the girls to join a support group for children of divorce because they had "already gotten past the point of the fact that their parents were divorced." 1/11/16 RP 120. He confirmed that the girls have received no counseling since their mother's arrest, but that he has done "extensive research" online about warning signs of kids in distress and made a few calls to counselors. 1/11/16 RP 119.

The GAL testified consistent with her report, opining that there is "no credible evidence" that Lofgren does not pose a great risk of psychological harm to the children. 1/12/16 RP 195. She agreed with Hardin that Lofgren would harm the children by sending a card "because they specifically voiced they don't want contact," and would feel "betrayed" by whomever presents the card to them. 1/12/16 RP 181. Kevetter conceded she had not reviewed any research pertinent to the facts of this case, including research on relationships between incarcerated mothers and their children, or including the effect on children of long-term

deprivation of all contact with a parent. 1/12/16 RP 178.[5] Kevetter omitted any mention of her previous findings that led her to conclude Lofgren had good parenting skills and of the evidence of the children's attachment to her.

Lofgren's sister, Kaye Nelson, testified about her few contacts with the girls following Lofgren's arrest and described Hardin's resistance to allowing her to contact the girls. 1/12/16 RP 140-143 (e.g., not responding to invitations to cousins' birthday parties, refusing to accept Christmas gift for the girls, asking her not to communicate with him until legal process concluded). She also testified that Hardin tried to persuade her not to help Lofgren pursue visitation and told her that if Lofgren received visitation, he would move with the girls. 1/12/16 RP 142-43.

Hardin called two friends as witnesses, who criticized Lofgren's parenting based on dated observations. 1/12/16 RP 212-13 (described "verbal battle" with L.H. when she was eight as not "healthy parenting"); 1/12/16 RP 226 (child referred to Lofgren as "Karen" instead of "Mom").

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[5] She testified that "there is research done primarily focusing on fathers who are incarcerated, but this is not in the realm of domestic violence." 1-12-16 RP 178. When asked about research she considered about the long-term effects of no contact between a parent and child, she testified that she has "looked at the research done on incarcerated fathers," but that "these are not fathers who are incarcerated for violent crimes." Id. at 179. When asked if she did any specific research about potential effects of long-term no contact with a mother, she said she did not recall reading any specific studies about that, noting "it is so taken for granted that mothers are a part of their children's lives that there aren't studies on mothers and children." Id. at 180-181. For Kevetter not to know of any studies does not mean there are no studies.

5) The trial court effectively maintained the no-contact order.

After hearing the evidence, the trial court denied Lofgren's petition for modification. CP 255-71. After acknowledging that children should not be left to decide whether to have contact with a parent, CP 257-58, the trial court adopted the GAL's recommendation prohibiting Lofgren from having any contact with the children "until such time as the children express a desire for contact." CP 278. Any such request would be conveyed through the father, who would act as "gatekeeper." CP 263; see, also, CP 278 ("Upon the children expressing such a desire, the Father will determine the best manner in which to facilitate that contact"). Likewise, the court determined that if the children "express a desire to see a therapist on this issue or to see a therapist, to see their mother with the father's guidance through a mental health professional if he needs it, they should be able to see their mother." CP 263-264.

The court made an additional finding under paragraph 2.2 of the final parenting plan of "the absence or substantial impairment of emotional ties between the parent and child," CP 269, 275, stating "the relationship between the mother and the children is not existing with the mother at this point other than a memory and some contact with relatives." CP 269.

The court denied Hardin's request for attorney fees, noting there was no basis either under RCW 26.09.140 or for any kind of bad faith on the mother's part. CP 266. However, the court ordered that Lofgren pay 100% of the GAL's fees and that she also pay Hardin $5817.90 for "expert witness fees and costs for deposition and trial preparation." CP 269.

Lofgren timely appealed. CP 246-285.

IV. ARGUMENT

A. THE STANDARD OF REVIEW.

This Court reviews with strict scrutiny challenges to claimed infringements on a parent's constitutional rights. *State v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009). This Court reviews alleged due process violations *de novo*. *In re Dependency of A.D.*, 193 Wn. App. 445, 451, 376 P.3d 1140, 1144 (2016). Review of a trial court's order on modification of a parenting plan is for an abuse of discretion, as is review of a trial court's order denying a continuance. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993); *Harris v. Drake*, 116 Wn. App. 261, 287, 65 P.3d 350, 364 (2003), *aff'd*, 152 Wn.2d 480, 99 P.3d 872 (2004). However, "[i]f the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its

discretion." *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

B. LOFGREN HAS A CONSTITUTIONAL RIGHT TO CONTACT WITH HER CHILDREN, A RIGHT ALSO PROTECTED BY STATUTE.

This Court vacated the no-contact order in Lofgren's criminal sentence, recognizing the constitutional constraints on sentencing conditions. *See* § III(1), above. In a family law proceeding, the same fundamental constitutional rights apply. *Troxel v. Granville*, 530 U.S. 57, 77, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (the United States Supreme Court has "long recognized" 14th Amendment protects "a parent's interests in the nurture, upbringing, companionship, care, and custody of children"); *In re Luscier*, 84 Wn.2d 135, 137 and 139, 524 P.2d 906 (1974) (declaring under Const. art. 1 § 3 that Washington courts are "no less zealous in their protection of familial relationships").

The State may intervene in the family relationships where the parents are separating but the State must still act from the premise that, unless proven unfit, a parent "will act in the best interests of her child." *In re Marriage of Horner*, 151 Wn.2d 884, 895, 93 P.3d 124 (2004) (internal citation omitted). In other words, a parent is entitled to a presumption that placement of a child with the parent serves the child's best interests. *In re Custody of Shields*, 157 Wn.2d 126, 146, 136 P.3d 117, 127 (2006). Our

statute expressly "recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests." RCW 26.09.002.[6] Even where children and their parents are separated by other circumstances "the paramount goal … is to reunite the child with his or her legal parents, if reasonably possible." *In re Dependency of J.H.*, 117 Wn.2d 460, 476, 815 P.2d 1380 (1991).

A criminal conviction does not per se upend these constitutional and statutory principles. *See, e.g., Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed.2d 64 (1987) (prison inmates may not be denied the right to marry); *State v. Letourneau*, 100 Wn. App. 424, 443, 997 P.2d 436 (2000) (recognizing parent's fundamental right to raise children without state interference). Indeed, Washington policy in support of families includes specific support for incarcerated parents and recognition of the barriers that incarceration poses to the parent-child relationship. *See, e.g., In re Dependency of A.M.M.*, 182 Wn. App. 776, 785-786, 332 P.3d 500 (2014).

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[6] This emphasis on the importance of both parents is repeated in the statute. *See, e.g.*, RCW 26.09.187(3)(a) (providing residential provisions should "encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances").

Likewise, the family court must work from the premise that "the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." RCW 26.09.002. In other words, restrictions on a parent must be based on particularized evidence of "relatively severe physical, mental, or emotional harm to a child" and "must be reasonably calculated to prevent" such harm. *In re Marriage of Chandola*, 180 Wn.2d 632, 636, 327 P.3d 644 (2014). This rule does not change for incarcerated parents; quite the contrary: our state has a policy to encourage engagement and contact between children and their incarcerated parents. RCW 74.04.800.[7]

In this case, the original parenting plan was founded on an unlawful order prohibiting all contact between Lofgren and her children. It was not founded on a separate and unbiased inquiry into the children's

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[7] This statute provides, in pertinent part:

> (b) The secretary shall adopt policies that encourage familial contact and engagement between inmates of the department of corrections facilities and their children with the goal of facilitating normal child development, while reducing recidivism and intergenerational incarceration. Programs and policies should take into consideration the children's need to maintain contact with his or her parent, the inmate's ability to develop plans to financially support their children, assist in reunification when appropriate, and encourage the improvement of parenting skills where needed. The programs and policies should also meet the needs of the child while the parent is incarcerated.

best interests guided by the pertinent statutory provisions. There was no fact-finding; the court conducted no independent inquiry. Yet, when mandated by this Court to undertake that inquiry, the trial court evaded it, violating Lofgren's constitutional rights, the Washington Parenting Act, and failing to fulfill its duty to the discern the best interests of the children.

C. THE TRIAL COURT IMPROPERLY LIMITED THE SCOPE OF THE PROCEEDING AND IMPROPERLY DENIED LOFGREN THE CONSTITUTIONAL PRESUMPTION FAVORING CONTACT WITH HER CHILDREN.

Recently, Division Three observed that another important protection inherent in cases involving parents and their children is the adjudication of facts by a judge, a hallmark of due process necessary to protect the parent's liberty interest. *In re Custody of T.L.*, 165 Wn. App. 268, 268 P.3d 963 (2011). Lofgren has never had an adjudication of parenting issues -- not in 2013, nor as set forth below, a full and fair adjudication in 2016. Despite the unusual procedural posture of Lofgren's case, this is its most salient feature – the failure in 2016 to undertake the analysis pre-empted by the criminal no-contact order, the analysis contemplated by this court's order. CP 400 ("[t]he matter and manner of contact between the children and Lofgren is best resolved by the family court in the dissolution proceeding").

The Parenting Act provides for modification as a mechanism for changing a parenting plan. RCW 26.09.260; *see* Tegland, 4 *Wash. Prac.*,

Rules Practice CR 60 (6th ed.), at Comment 25. However, in this case, though taking the form of a modification, the substance of the proceeding bears a greater likeness to that of vacating the parenting plan. *See*, CR 60(b)(6) (vacating judgment where based on a prior judgment which "has been reversed or otherwise vacated…"); CR 55 (vacating judgment entered by default). For example, where a directed verdict in a civil action was based on a criminal conviction, later vacated, the civil judgment likewise must be vacated. *Fahlen v. Mounsey*, 46 Wn. App. 45, 728 P.2d 1097 (1986) (also, judgment could have no preclusive effect). Here, the 2013 parenting plan was effectively a judgment on the pleadings (CR 12(c)) given the constraint of the no-contact order. Simply, the "modification" posture of the case should not limit the inquiry.

Similarly, as recognized in other cases holding that if the court did not undertake an independent evaluation of the facts and statutory factors, modification is permitted without a change of circumstances. *See, e.g., In re Rankin*, 76 Wn.2d 533, 537, 458 P.2d 176 (1969) (default custody decree); *Timmons v. Timmons*, 94 Wn.2d 594, 617 P.2d 1032 (1980) (uncontested custody decree); *Pippins v. Jankelson*, 110 Wn.2d 475, 754 P.2d 105 (1988) (stipulated child support order) (superseded by statute in respect of unrelated issue, as recognized by *State v. Cooperrider*, 76 Wn. App. 699, 887 P.2d 408 (1994); *accord In re Marriage of Schumacher*,

100 Wn. App. 208, 213, 997 P.2d 399, 403, (2000). Properly, these cases elevate substance over form, recognizing both that the paramount concern in these proceedings is the welfare of the child and that, unless a court has an "opportunity to pass upon adequately presented evidence," there can be no presumption that the child's interests have been protected. *Rankin*, 76 Wn.2d at 537 (internal citation omitted). Just as in *Rankin*, the court in 2013 had "had no opportunity to observe the two contending parents upon the witness stand or to examine the evidence concerning their fitness and concerning the welfare of the child." *Id.*, at 536.

In short, purely as a procedural matter, what this case called for was the very trial pre-empted by the unlawful no-contact order. Instead, the trial court improperly narrowed the scope of the proceeding and inserted a presumption against Lofgren.

1) Burden of Proof

As previously stated, Lofgren enjoys a constitutional right to contact with her children. Any limitation on that contact must serve a compelling state interest and must certainly be arrived at only in compliance with due process. What process is due must include, at minimum, compliance with Washington's statute, which presumes contact to be in the children's best interests and requires proof to the contrary as a predicate to any restrictions. *See Chandola*, 180 Wn.2d at 646 (statute

requires "a particularized finding of a specific level of harm before restrictions may be imposed"). Even where parental deficiencies exist, the state's "paramount goal … is to reunite the child with his or her legal parents, if reasonably possible." *In re Dependency of J.H.*, 117 Wn.2d 460, 476, 815 P.2d 1380 (1991). Here, the court reversed this presumption, ordering that Lofgren would have the "burden of proof as to whether contact is in the children's best interests." CP 90. In fact, in a modification proceeding, the petitioner has the burden to establish adequate cause, but upon doing so, is entitled to "a hearing date on an order for the other party to show cause why the requested modification should not be granted." RCW 26.09.260 (emphasis added); *In re Marriage of Tomsovic*, 118 Wn. App. 96, 104, 74 P.3d 692, 695–96 (2003). The inquiry turns at that point to the best interests, but the burden of proof does not fall on one party or the other. Here, to the contrary, the court set the bar even higher, presuming that contact would be harmful. CP 90. Rather than setting the case on a path toward a full and fair adjudication, the court stacked the deck against Lofgren and evaded the inquiry this Court contemplated and the inquiry our laws and policies require.

2) Scope of Proceeding.

The modification statute includes an adequate cause requirement, which the court found here was met, presumably by vacation of the no-contact order. CP 90. *See* RCW 26.09.260(5) (requiring substantial change of circumstance). However, the trial court summarily limited the scope of the potential relief to "what, if any, contact there should be between mother and children." CP 90 ("all other provisions … shall remain in full force and effect"). The basis for this limitation is not stated, though the court in the parenting plan it ultimately entered refers to a paragraph from the 2013 parenting plan, which states:

> ONLY the provisions regarding the respondent/mother's contact with the children may be reviewed if the provisions of the no contact orders regarding the children entered under cause no. 12-1-00662-0 on 1/25/2013 are terminated.

CP 4 (¶ 3.13), cited by court at CP 277. This paragraph declares the criminal no-contact order controlling, foreclosing any inconsistent order. It is not clear how the court could read this provision to mean anything else.[8] In any case, the statute governs what relief is available and compliance with the statute is mandatory. *See Bower v. Reich*, 89 Wn.

[8] The sentence would be more grammatical if the "only" had been inserted between "reviewed" and "if" (i.e., review occurs only if no-contact order terminated). The court appeared to read it this way, as well. CP 105 ("the parenting plan that was entered says basically you get a review if your no-contact order is lifted"). The court did go on to opine that it did not "think we need to review 2.1 and 2.2." If this sentence requires interpretation, contract principles would control, meaning the parties' intent controls as made objectively manifest. *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 942, 974 P.2d 1261 (1999).

App. 9, 14, 964 P.2d 359 (1997). The court had no authority to limit the proceeding as it did, especially in light of the peculiar procedural history discussed above.

Nor did the court have the authority to make a preemptive finding "that there may be a grave risk of psychological harm to children from Ms. Lofgren." CP 90. Our legal system requires a neutral arbiter. *Greenlaw v. United States,* 554 U.S. 237, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008). In particular, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* By forecasting its opinion on the evidence before the evidentiary hearing had even begun the court raised an appearance of unfairness. *See Dimmel v. Campbell,* 68 Wn.2d 697, 414 P.2d 1022 (1966) (found where judge's law partner had expressed opinion the court later adopted, even though judge did not recall letter). Not least of all, the court's opinion may have tainted the neutrality of the GAL investigation, already suspect for reasons discussed above and further below. In short, Lofgren was entitled to a clean slate in the parenting action and she did not get that.

Finally, the court should not have given preclusive effect to the "191" findings from the 2013 parenting plan. CP 91, 262, 270, 275. It is as unfair here as in to apply collateral estoppel. As *Fahlen v. Mounsey,* 46 Wn. App. at 50. The same lesson is taught by those cases such as *Rankin*

et al (cited above) elevating the importance of a trial on the merits over orders entered by stipulation or default. *See, also, In re Custody of Z.C.*, 191 Wn. App. 674, 708, 366 P.3d 439, 449 (2015), *as amended* (Dec. 17, 2015) (modification of stipulated custody decree meant new trial with parental fitness presumed). Certainly, the court may find a basis for restrictions, as this Court noted in its opinion in the criminal case. But to foreclose a fact-finding on these crucial issues cannot be fair or serve the children's best interests. For example, it bears noting that Lofgren's crime, serious as it is, does not appear to satisfy the statutory definition of domestic violence.[9] It does not minimize her offense to observe that precision is required in a court of law, as the trial court here at one point acknowledged. CP 262 (asking the "sexual assault" language be redacted).

The main point is that this case cried out for the trial that never happened. These parties had made numerous and serious allegations regarding each other's conduct. They disputed almost every fact relevant to a parenting plan determination, as discussed above. Resolution of these

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[9] RCW 26.50.010(3) defines domestic violence as:

> (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

many issues did not happen; instead, the no-contact order hijacked the proceedings and they have yet to get back on track.

D. THE COURT'S ANALYSIS UNDER RCW 26.09.187 MISSED THE MARK AND THE COURT'S CONCLUSION IS NOT BASED ON THE CHILDREN'S BEST INTERESTS OR COMPLIANT WITH THE WASHINGTON LAW REQUIRING PROOF OF HARM AND NEXUS FOR ANY RESTRICTIONS.

Given the unusual procedural posture of this case, it is understandable that the court searched for a frame of reference, resorting to RCW 26.09.187. CP 258-261. However, these criteria mechanically applied proved a poor fit for the facts of this case, and not only because the criteria guide the court in deciding primary residential placement, which was plainly not at issue.[10] Even where pertinent, to be useful the factors necessarily must be considered in light of the no-contact order, which preempted a trial on parenting issues in 2013 and exiled the mother from the children's lives. Indeed, in an analogous context, statute specifically declares incarceration will not be deemed a parent's voluntary failure to have contact with a child. RCW 13.34.180(1)(e)(3) ("a parent's current or prior incarceration or service in the military does not in and of itself constitute failure to have contact with the child"). Yet here, the court used the mother's absence to fault her for impaired attachment, both under a "187" analysis and as a "191" factor. CP 259, 269. These

[10] If the court found facts supporting RCW 26.09.191 factors, the analysis is driven by that statute, including the requirement of a "nexus," as reinforced recently in *Chandola*.

findings cannot stand, especially in light of the limits placed by the court on the inquiry, magnified by its exclusion of Lofgren's expert and the bias of the GAL.

Rather, the better analogy is to dependency/termination cases and to third party custody cases, where a parent has been out of the child's life. Here, during the dissolution proceedings, Lofgren had been primary residential parent under the temporary orders. 1-11-16 RP 39. The record contains substantial evidence of her deep engagement with the children. Even the GAL, Kevetter, pronounced her a good parent in her first report, when the children were aged five and seven. CP 310; see also CP 293-301 (children describing attachment). Notably, because there was no parenting plan trial, the evidence about the children's relationship with their mother comes almost entirely from the GAL, whose objectivity was questioned then and is questioned here. And the court showed little understanding of the importance and durability of the parent-child bond when it reduced Lofgren to a distant memory, aiding Hardin's efforts to efface her. CP 269; see, e.g., 1/11/16 RP 99 (telling girls Lofgren not their mother); Ex. 3 at 8 (father instructed school counselor not to talk to the girls or check on how they are doing); 1/12/16 RP 140-143 (Nelson describing father's resistance to contact with aunt and cousins as well as Lofgren).

Here, again, the court's analysis goes off the rails because of its improper foundation: the court, already having prejudged the issue at adequate cause and improperly structured its inquiry, merely digs in deeper here, revealing a predisposition against the incarcerated parent. See, e.g., CP 259. What gets lost is the presumption that contact is in the children's best interests and that any restriction on contact must be founded in a specific harm and related to protecting against that harm. Here, instead, Lofgren ends up with the same no-contact order this Court vacated.

The court does mention the "191" factors entered in the 2013 parenting plan, which, as argued above, do not deserve preclusive effect. However, even if the court could find a basis for some limitation on Lofgren, that does not end the inquiry. It has long been the law in Washington that a parent's access to his or her children cannot be limited absent some explicit harm to the children, harm that amounts to more than the children's problems of adjustment to their new family circumstances. *Katare v. Katare*, 175 Wn.2d 23, 37, 283 P.3d 546, 553 (2012), *citing, inter alia, In re Marriage of Cabalquinto,* 100 Wn.2d 325, 329, 669 P.2d 886 (1983). Even for domestic violence, where the court must impose some limitations on the parent's residential time, the court still must determine what limitations (statute does not specify) are necessary to

address the harm.[11] Likewise, the court may apply restrictions under RCW 26.09.191(3) factors "only where necessary to 'protect the child from physical, mental, or emotional harm…'" *Marriage of Chandola,* 180 Wn.2d at 648. And the restrictions must have a nexus with the harm: "A trial court abuses its discretion if it imposes a restriction that is not reasonably calculated to prevent such a harm." *Id.* Here, the court did not undertake to connect these dots, nor is there evidence to support such a connection. Lofgren's crime cannot, per se, warrant restrictions. Many incarcerated parents continue to provide love, nurture, and emotional support to their children. Indeed, the record indicates that Lofgren's children were uppermost in her mind, even when she committed her offense, as this Court acknowledged. CP 393, 399 (noting evidence she was trying to protect children). The bond between parents and children can endure many things. Our law presumes the bond deserves protection, even where a parent engages in unlawful conduct. Here, the court failed to proceed from the presumption that these children's best interests are best served by a relationship with their mother.

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[11] Under the statute, once domestic violence has been established, the abusive parent's residential time "shall be limited" unless the court "expressly finds" (1) that contact with the abusive parent will not cause abuse or harm to the child and (2) that the probability of recurring abuse is so remote that the "limitations of (a), (b), and (m)(i) and (ii)" would not be in the children's best interests, or if the court "expressly finds" that the parent's conduct did not have an impact on the children, then it need not apply the "limitations of (a), (b), and (m)(i) and (ii)." RCW 26.09.191(2)(n).

E. BY DENYING LOFGREN A CONTINUANCE TO OBTAIN A NEW EXPERT, THE COURT FAILED IN ITS PARAMOUNT DUTY TO FULLY CONSIDER ALL RELEVANT EVIDENCE BEARING ON THE BEST INTERESTS OF THE CHILDREN.

Not only does due process require a full and fair adjudication, so does our state law, which recognizes that a court may fulfill its duty to the children only by engaging in a full and fair inquiry into all relevant facts. Here, not only did the court upend the usual presumption favoring parent-child contact and structure the inquiry as one where a presumption of harm must be overcome, the court deprived Lofgren and deprived the court of a witness essential to the inquiry – Lofgren's expert. This witness, with uniquely pertinent expertise, was critical of the GAL, already challenged for bias in the original proceedings and appointed by the court for the modification over objection and in violation of the statute, as discussed in the next section. See § III.E.

CR 40(d) provides that "[w]hen a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance." Generally, a court has discretion to grant or deny a continuance, a decision that will be upheld where based on tenable reasons. *Harris v. Drake*, 116 Wn. App. 261, 287, 65 P.3d 350, 364 (2003), *aff'd,* 152 Wn.2d 480, 99 P.3d 872 (2004). In *Harris,* for example, the party seeking the continuance had long known the witness might be unavailable, had three years to obtain a more reliable expert, and the trial already had been

continued eight times. *Id.* Here, by contrast, Lofgren's witness had no such reliability issues and she was uniquely qualified for the unusual circumstances here (e.g., incarcerated parent). CP 183, 189. Certainly, she was essential to critiquing the report of the GAL, to whose re-appointment Lofgren had twice objected because of bias. CP 344, 345-351, 352-372; 2/6/15 RP 14. Lofgren had no reason to expect Ulrich to become unavailable. Moreover, trial had not been delayed by Lofgren. (Hardin had been granted a continuance.)

The court gave as the only reason for denying Lofgren's continuance that the circumstances were not "extraordinary," citing a local rule, PCLR 40(g)(2)(B) as governing. CP 195.[12] The usual considerations for a continuance are "diligence, due process, the need for an orderly procedure, the possible effect on the trial, and whether prior continuances were granted." *In re V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85, 89 (2006). All of these criteria line up here in favor of granting Lofgren's motion: her diligence cannot be questioned; her right to a fair proceeding

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[12] The local rule, in pertinent part, provides:

> ... If a motion to change the trial date is made after the Deadline to Adjust Trial Date, the motion will not be granted except under extraordinary circumstances where there is no alternative means of preventing a substantial injustice. A continuance may be granted subject to such conditions as justice requires. ...

is at stake; the witness is crucial; no prior continuances were requested by her or granted to her; and the status quo would remain unchanged.

To the extent the local rule is more stringent than the state rule, the local rule must yield.[13] Here, however, not even the local rule is satisfied. The circumstances could not be more extraordinary than having one's only expert witness rendered unavailable on the eve of trial because of an immediately family member's life-threatening illness. To deny Lofgren a continuance effectively forced her to trial without an expert, a sanction the court can impose only after conducting an analysis prescribed by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997), i.e., whether the violation was willful and prejudicial and whether less severe sanctions are appropriate. These factors do not support exclusion of the witness here.

The important principle at stake here is that trials should be decided on their merits. This is why a trial court, addressing itself to a discovery violation, "may impose only the least severe sanction that will be adequate to serve its purpose in issuing a sanction." *Teter v. Deck*, 174

[13] CR 83(a) allows local courts to make rules governing their practice "not inconsistent with these rules." Local rules conflict with the court rules when they are " 'so antithetical that it is impossible as a matter of law that they can both be effective.'" *Sorenson v. Dahlen*, 136 Wn. App. 844, 853, 149 P.3d 394 (2006) (quoting *Heaney v. Seattle Mun. Court*, 35 Wn. App. 150, 155, 665 P.2d 918 (1983), *rev. denied*, 101 Wn.2d 1004 (1984). Accordingly, the court must inquire "'whether [t]he two rules can be reconciled and both given effect.'" *Sorenson*, 136 Wn. App. at 853 (alteration in original) (internal quotation marks omitted) (quoting *City of Seattle v. Marshall*, 54 Wn. App. 829, 833, 776 P.2d 174 (1989), *rev. denied*, 115 Wn.2d 1008 (1990)).

Wn.2d 207, 216, 274 P.3d 336 (2012). The circumstances here are remarkably similar to those in *Teter*, where the plaintiff's expert became unavailable a month before trial due to an injury. Then the substitute expert also became unavailable, due to a conflict, and the court struck the proposed second substitute, leaving the plaintiffs without any expert. 174 Wn.2d at 338-339. Here, the procedural posture is slightly different (instead of defending against a motion to strike the late-disclosed substitute expert, Lofgren is seeking a continuance to obtain such a witness), but the effect and the governing principles are the same: the expert was crucial to a trial on the merits.[14]

Moreover, special considerations apply in this context. A full inquiry into the best interests of the children is critical to serving the court's "paramount concern for the welfare of the children." *See Bay v. Jensen*, 147 Wn. App. 641, 657, 196 P.3d 753 (2008); *Ambrose v. Ambrose*, 67 Wn. App. 103, 109, 834 P.2d 101, 105 (1992) (error for court not to consider "any and all relevant evidence"). In *Bay*, for example, this Court disapproved punitive sanctions for litigation abuse, holding it "'inappropriate and erroneous to withhold an inquiry into the best interests of the children as a penal remedy' for failing to comply with a court

[14] The timing accounts for these differences, with Lofgren having no more than a moment's notice of Ulrich's unavailability immediately before trial was scheduled to begin.

order." 147 Wn. App. at 657. Indeed, in this case, this Court expressly recognized the need for full court investigation and evaluation of the children's best interests when it vacated the lifetime no contact order imposed by the criminal court and sent the case back to the family court to determine what contact the children should have with their mother under the parenting act. CP 400 (citing *Letourneau*, 100 Wn. App. at 443).

Here, the expert offered the court uniquely valuable knowledge, drawn from 20 years of experience with children in similar circumstances, especially important given the GAL's lack of experience and knowledge. CP 183, 189. When the court denied Lofgren a continuance, not only did it deny her a full and fair hearing, it failed its duty to fully inform itself on the children's best interests. This was error. "[T]he trial courts should rely on expert opinion to help reach an objective, rather than subjective, evaluation of the issue." *In re Marriage of Woffinden*, 33 Wn. App. 326, 330 n.3, 654 P.2d 1219 (1982), *review denied*, 99 Wn.2d 1001 (1983). *See, also, In re Stell*, 56 Wn. App. 356, 370, 783 P.2d 615 (1989) (regarding importance of independent expert opinions). Here, especially, where the parent is incarcerated, the court could have benefitted even more than usual from the assistance of a qualified expert. Indeed, most people, including judges, might have difficulty getting past their own preconceptions about convicts, a bias an expert could help to correct.

Here, the cost of a continuance paled in comparison to the cost of proceeding without this crucial witness.

F. THE TRIAL COURT VIOLATED THE STATUTE BY APPOINTING THE SAME GAL, WHOSE BIAS TAINTED THE PROCEEDINGS AS EVIDENT IN HER FAILURE TO FULLY INVESTIGATE OR APPROACH THE INQUIRY WITH THE NECESSARY NEUTRALITY.

Frances Kevetter served as guardian ad litem in the first proceeding, issuing a report prior to Lofgren's arrest, CP 288-313 (February 3, 2012 GAL report) which was updated five months later (on July 10, 2012) to check on children's "general welfare." Ex. 1 at 2. As described above, her role was contested by Lofgren and, because there was no trial, her views were never subject to examination. Nevertheless, over Lofgren's objection, the court again appointed Kevetter because it was "expedient." CP 111-112.

Statute governs the appointment of guardians ad litem, specifically providing for creation of a registry of guardians and providing that a GAL "shall be selected from the registry except in exceptional circumstances as determined and documented by the court." RCW 26.12.177(2). Alternatively, "[t]he parties may make a joint recommendation for the appointment of a guardian ad litem from the registry." *Id.* Here, the court did not comply with this statute – did not choose a guardian ad litem from the court registry and did not make a finding of "exceptional

circumstances" requiring reappointment of Kevetter. Unfortunately, it is not exceptional for parties to litigate multiple times in family law; in fact, family law is unusual in respect of the statutory mechanism for changing otherwise final orders (i.e., modification), meaning that some cases and families do return to court multiple times.

In fact, the most exceptional circumstance in this case in terms of the guardian ad litem is the controversy surrounding her previous service in this case. Lofgren questioned her impartiality after Kevetter undertook to instruct the parties on religious grounds (reflecting a religious viewpoint similar to one Hardin had assumed). Lofgren also criticized deficiencies in Kevetter's investigation, including failures to interview and to investigate. These exceptional circumstances strongly disfavor reappointment. In any case, the court simply ignored the requirement for exceptional circumstances and reappointed Kevetter.

Unfortunately, the investigation Kevetter performed for the modification reveals the same deficiencies: failures to interview relevant persons (e.g., Lofgren!), wholesale dismissal of relevant information (e.g., expert's report,), failure to do pertinent research, and a scathing judgment of Lofgren in which the GAL acts as fact-finder and judge in respect of the many unresolved factual disputes evident in the contentious litigation preceding the criminal case. Ex. 3, at 11, 12-13. And her

recommendation left wholly within the control of the father whether the children might ever have access to their mother – a man whose hostility, however understandable, must be acknowledged as interfering with his neutrality.

A guardian ad litem has the duty to represent the interests of the minor children. RCW 26.12.175(a). In discharging this duty in family law matters, GALs must "do their important work fairly and impartially." *In re Marriage of Bobbitt*, 135 Wn. App. 8, 25, 144 P.3d 306 (2006). The statute authorizing Kevetter's appointment was enacted "to assure that the welfare of the children whose parents are involved in litigation concerning them remains the focus of any investigation and report, and that acrimony and accusations made by the parties are not taken up by an investigator whose only job is to report to the court after an impartial review of the parties and issues." *Id.* Moreover, court rules impose specific duties on GALs, such as:

> [I]n every case in which a guardian ad litem is appointed, the guardian ad litem *shall* perform the responsibilities set forth below[:]
>
> ....
>
> **(b) Maintain independence.** A guardian ad litem shall maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom.
>
> ....

> **(f) Treat parties with respect.** A guardian ad litem is an officer of the court and as such shall at all times treat the parties with respect, courtesy, fairness and good faith.
>
> **(g) Become informed about case.** A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and *to contact all parties.* A guardian ad litem shall examine material information and sources of information, taking into account the positions of the parties.
>
> ...
>
> **(*o*) Perform duties in a timely manner.** A guardian ad litem shall perform responsibilities in a prompt and timely manner, and, if necessary, request timely court reviews and judicial intervention in writing with notice to parties or affected agencies.

GALR 2 (emphasis added). Kevetter failed to comply with these basic requirements, rendering her report completely unhelpful.

For all these reasons, not least of all the noncompliance with the statute, a new trial with a new guardian ad litem is required.

G. THE COURT CANNOT DELEGATE ITS AUTHORITY TO THE FATHER.

The court left the father in charge of whether any contact would occur between the children and the mother. This Court has held similar delegations to be improper. *In re Parentage of Schroeder,* 106 Wn. App. 343, 352-353, 11 P.3d 1280 (2001); *In re Parentage of Smith-Bartlett,* 95 Wn. App. 633, 640, 976 P.2d 173 (1999). For this and the other reasons already argued, this mechanism should be vacated.

H. THE COURT ERRED WHEN IT CHARGED LOFGREN WITH THE ENTIRE COSTS OF THE GAL AND ATTORNEY FEES.

Lofgren is serving her sentence for her crime of conviction, yet the family law proceedings seem punitive in many of the respects described above. Likewise, the court seemed to punish Lofgren by imposing on her alone the cost of the guardian ad litem on the theory that she should pay because she sought to change the parenting plan. CP 110-111. Here, again, the statute governs, providing that "[t]he court may order either or both parents to pay for the costs of the guardian ad litem, according to their ability to pay." RCW 26.12.175(1)(d). If both parties are indigent, the county shall pay. Here, the court failed even to conduct an inquiry into the financial circumstances of the party, though Lofgren's were on record as being grim. CP 266. The guardian ad litem serves to assist the court to meet the best interests of the children. The court's reasoning here, assessing the cost against a parent seeking to modify in compliance with this Court's own mandate, undermines that purpose, including by potentially chilling parents from seeking remedies in court. Because the order violates the statute, it should be reversed.

Similarly, the court's award of attorney fees to Hardin for the cost of preparing for trial has no legal basis. CP 269. Basically, the court required Lofgren to pay the attorney fees Hardin spent to depose Lofgren's expert witness (Ulrich) and otherwise prepare for trial. CP 405-

408. This award violates Washington law, which permits such awards "only when authorized by a private agreement, a statute, or a recognized ground of equity." *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn2.d 826, 849-850, 726 P.2d 8 (1986). The court cited none of these grounds and none of them pertains. In fact, the court expressly found Lofgren pursued her action in good faith, denying fees on the basis of intransigence as Hardin requested. CP 266. As noted above, none of the authorities support fee and cost awards applies here. Again, regrettably, the court's punitive attitude seems revealed.

V. CONCLUSION

For the foregoing reasons, Karen Lofgren respectfully asks this Court to vacate the order on modification and remand for a new trial before a different judge and with a different guardian ad litem.

Respectfully submitted this 18th day of November 2016.

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Superior Court of Washington
County of PIERCE

In re the Marriage of: TODD HARDIN **Petitioner,** **and** KAREN LOFGREN Respondent.	**No.** 11-3-02193-8 **Findings and Order Re Modification/Adjustment Of Custody Decree/Parenting Plan/Residential Schedule (ORMDD/ORDYMT)**

I. Basis

This order is based on Ms. Lofgren's Petition for Modification of the April 24, 2013 Final Parenting Plan and a finding that adequate cause had been established for hearing the petition and the subsequent trial.

II. Findings

The Court Finds::

2.1 Jurisdiction

This court has jurisdiction over this proceeding for the reasons below.

This state is the home state of the children because: the children lived in Washington with a parent or a person acting as a parent for at least six

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consecutive months immediately preceding the commencement of this proceeding. Any absences from Washington have been only temporary.

The children and the parents or the children and at least one parent or person acting as a parent have significant connection with the state other than mere physical, presence; and substantial evidence is available in this state concerning the children's care, protection, training and personal relationships, and: The children have no home state elsewhere. No other state has jurisdiction. Other:

1. The respondent/mother was convicted of solicitation to commit murder of the petitioner/father, second degree, on January 25, 2013, under Pierce County Cause No. 12-1-00662-0, was sentenced to 165 months in prison, and was ordered to have lifetime no contact with the petitioner/father and the minor children. Respondent/mother, Karen Lofgren, appealed her criminal sentence regarding the lifetime no contact orders with the parties children. The Court of Appeals vacated the criminal lifetime no contact order regarding the children and held "the matter and manner of contact between the children and Lofgren is best resolved by the family court in the dissolution proceeding." The Court of Appeals also added the following as a footnote on page 9: "Moreover, our opinion does not preclude a court from issuing a no-contact order grounded on other statutory bases."

The Agreed Final Parenting Plan of April 24, 2013 provided in paragraph 3.13.2 that *"ONLY the provisions regarding the respondent/mother's contact with the children may be reviewed if the provisions of the no contact orders regarding the children*

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entered under cause no. 12-1-00662-0 on 1/25/2013 are terminated." The Final Parenting Plan entered concurrently herewith is a result of the Mother's Petition for Modification and the trial on that Petition. Pursuant to the Order on Revision entered February 6, 2015, the Court found the Mother had the burden of proof as to whether contact between Mother and children was in the children's best interests.

The lifetime no contact order between Karen Lofgren and Todd Hardin entered under Pierce County Cause No. 12-1-00662-0 remains in full force and effect.

2. At the trial on January 11 and 12, 2016, the following witnesses testified:

a. Karen Lofgren
b. Todd Hardin
c. Kay Nelson
d. Guardian ad Litem Frances Kevetter
e. Lynn Christensen
f. Kelly Pinaroc

3. At the conclusion of trial on January 12, 2016, Judge Garold Johnson made the following FINDINGS:

a. "I've read the materials, and I have listened to the evidence in this case. This is a problematic case in that we have fairly young children, nine and twelve years old, that I'm put in an impossible position, frankly, a position that someone in my age, frankly, would have difficulties with. But we're asking children here at no choice of their own in some respects as to what to do next. Let me explain what I'm saying. Children who quite clearly the evidence is do not wish to have contact with their mother; that is the evidence, and it is persuasive in this case. Do we tell children who don't want to have contact with their mother when they're nine years old okay, no contact with your mother because you asked for it. That

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doesn't seem to be what the proper thing is to do. A child's vision, the child's understanding of life, the child's understanding of how they will feel a few years down the road and how they will see these events, we could put something in to action that we never intended, and I'm including the father, that could really hurt. So this is problematic. On the other hand, to order a child to go see her mother who tried to kill her father certainly is problematic as well. That's kind of the backdrop of this case. Let me do something, and I understand that some people may have a dispute about proceeding in some respects in this way. But any guidance at all, even if I was to follow RCW 26.09.187, which is if there was no parenting plan, I think it's important to kind of go through this, because these elements are still prevalent or still worth thinking through even in a RCW 26.09.260 situation, which is what this is. This is under subparagraph 3 of RCW 26.09.187. Starting with subparagraph (3)(a)(i), the relative strength, nature, and stability of the child's relationship with each parent.

> **(i) The relative strength, nature, and stability of the child's relationship with each parent**: There is no question at all that in the given situation today the relative strength, nature and stability of the child's relationship favors the father dramatically, and that there is absolutely no question about this at all, certainly by the preponderance of the evidence. Saying that it's not mom's choice is extraordinarily shallow, frankly. She got herself in this position. She created this situation. And consequently, I'm not even sure that's necessarily a controlling factor, but it is a thought

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to think through. But the relationship with the father is much stronger than it is with the mother. In fact, it's not existing with the mother at this point other than a memory and some contact with relatives.

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily: The parties' agreement; well, there is a prior parenting plan that acknowledges the situation. I'm not sure I would really call that an agreement as contemplated by this statute. (RCW 26.09.187(3)(a)(ii))

(iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child: Each parent's past and potential performance of parenting functions. Once again, this strongly favors the father. The mother is going to be in prison for a considerable length of time. That statute goes on to say, or that subsection goes on to say, whether a parent has taken greater responsibility performing parental functions. The father certainly has, and certainly in the last several years since her arrest.

(iv) The emotional needs and developmental level of the child: The emotional needs and development level of the child. And this is for both of these children I think a very important thing to focus on, I'll talk about it again, but the emotional needs and development of the children here, what they don't need to be done is to make them the decision-maker. I

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disagree with that idea completely. On the other hand, what they don't need to be done is force them to visit somebody or receive correspondence from somebody that may cause serious harm to the children. That's the problem we're in.

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities: Subparagraph (v), or little v, Roman Numeral v, the children's relationship with siblings and with other significant adults, as well as their involvement with their physical surroundings, school, and other significant activities. Focus here a little bit, the father and his relatives have been involved; recently the sister of the mother has been involved. The physical activities of the school and so forth, seem to be doing extremely well. Particularly, given the circumstances it's, frankly, amazing. This is her home, "her" being both the children's I should say, the children's home. That is their surroundings; that is their base. I certainly do take that into consideration.

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule: The wishes of the parents. You know, honestly, I look at this, and I think that particularly the father's wishes are just do what's best for the children. And I don't mean that to say he doesn't have his own motivations he may not even

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recognize; that happens with all of us. But he's looking at this saying all right, how do we get these children through this hump. Let's try not to do any more damage. The mother on the other hand is a bit confused. And I understand that. I don't mean that she's an evil person on this issue. But she is a bit confused it appears to me of what is motivating her in the sense of wanting so badly to see her children, or is it to really try to make their lives better in the long run. I think those things have been confused in her mind, understandably so perhaps. The wishes of children -- this is under subparagraph (vi) still -- the wishes of a child who is sufficiently mature to express reasoned and independent preferences. The children are awfully young. I've heard their wishes. I am considering them to some extent.

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules: Paragraph (vii) isn't really applicable. Each parent's employment schedule. One doesn't have one, but they're certainly not going to be available to have any sort of a visitation program in terms of what we normally think of in these cases.

The Statute goes on to say that (i), the relative strength, nature and stability of the child's relationship with each parent is given the greatest weight. So if I was designing the parenting plan under RCW 26.09.187, it would strongly favor the father under these circumstances in any event."

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b. **RCW 26.09.191:** "This case, however, is controlled by RCW 26.09.260 as I said earlier. There are limitations here. RCW 26.09.191 factors are here. They were found by the Court in the Final Parenting Plan entered April 24, 2013. There was no evidence at all that I should reconsider that in the first place. I think it would be inappropriate at this stage. There was no appeal from those decisions, and they are applicable here. There is a history of acts of domestic violence, as defined by the statute RCW 26.50.010, or an assault -- there's not a sexual assault. We can remove that. Frankly, I wish you would, please -- which causes grievous bodily harm. I know it's just a citation to the statute. There's no sexual assault here. Leave the connotation out, please."

c. "Paragraph RCW 26.09.191(3) is also applicable -- that was (1) and (2) -- and (3) is also applicable. There was quite clearly abusive use of conflict which created a great danger of serious damage to the children's psychological development; that their father had of been killed, my gosh, imagine where they would be today, or maybe not worse, potentially, but certainly horrific, gravely injured, where would the children be today. Those factors are here."

d. **GAL Recommendations:** "So that takes us what do we do. And this takes me back to the guardian ad litem's recommendation, and I know where she's trying to go, and I have -- let me tell you, I do agree with it to a great extent. And that is, when these children are ready -- this is the problem -- when these children are ready, if they become ready to see their mother, that's fine. And the father should not interfere with that. I agree with the guardian on that. And be

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supportive of it. The problem is, is expecting them to know when they're ready; that's really a problem. Asking a nine-year-old, are you ready? All the adults around are going to ask a child when they're ready to see their mother. It does seem to be a bit problematic. I just don't have a better solution other than to say this. If the children want to see -- I almost put this in a little bit reverse context, as the guardian did -- if the children, either one of them, want to see a therapist or counselor, then they certainly should be allowed to do so. Now, this is a father. It is presumed that he acts in the best interest of his children. The law strongly presumes that. And from the evidence I heard, it's been substantiated that he will. If these children need to see a therapist or just desire to see a therapist, or the father thinks they should see a therapist before they decide to see their mother; they may come up with I want to go see my mom. 13 years old, my gosh, the things we say. If he wants to work that through with a professional first that seems to be a very logical and well thought through idea. But if they want to see their mother, then they will go through this process of through the father's gatekeeper of whether or not they see a therapist or psychologist or some other sort of mental health professional to see their mother, they may. In the meantime, she is not to contact them. She's not to send them cards and -- it would just come completely out of context for these children at this point. Of course, as these children get older, what we adults say we'll see how much impact anyway; but at this point in their lives it does seem to be the right way to do this, is if the children express a desire to see a therapist on this issue or to

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see a therapist, to see their mother with the father's guidance through a mental health professional if he needs it, then they should be able to see their mother. Outside of that, the contact will remain limited to these points. That's it."

e. **Life Insurance:** The April 24, 2013 Final Order of Child Support ordered in paragraph 3.23: *"Mother has an obligation to maintain the Northwestern Mutual life insurance policy on her life with the children as irrevocable beneficiaries until there is no longer a support obligation for either child."* Ms. Lofgren allowed her life insurance policy to lapse on or around July 26, 2013.

In the Response to Petition filed on January 9, 2015, Mr. Hardin requested the following under section II, Requests, paragraph 2.2(A): *"Pursuant to paragraph 3.23, lines 15-17 of the Final Order of Child Support entered April 24, 2013, Respondent/Mother was required to maintain her Northwestern Mutual Life Insurance policy listing the minor children as irrevocable beneficiaries until such time as Mother no longer owed a child support obligation for either of the children. Mother violated this provision and allowed the policy to lapse on or around July 26, 2013 which was not discovered until July 2014 after Karen Lofgren had retained Attorney Sara Humphries. Mother has the funds available to her to employ several criminal counsel, criminal appellate counsel, civil counsel for the fraud lawsuit and two different family law counsel. Payment of the life insurance policy premium in the amount of $208.10 was consistently ordered and maintained during the divorce proceedings and even after she was arrested and jailed. The maintenance of this life insurance policy was integral to*

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Karen Lofgren's obligation for the care of the children and critical given her incarceration and limited court ordered child support. Karen Lofgren agreed to maintain this obligation. Given that proceeding with a contempt motion would be expensive and not achieve the reinstitution of the policy, Todd Hardin requests that Karen Lofgren be restrained from encumbering, withdrawing, or liquidating funds from her 401(a) and 403(b) benefits from her employment with Multicare, so as to maintain an amount equivalent to the death benefit payable under Karen Lofgren's now lapsed Northwestern Mutual Life Insurance policy and be ordered to name Leah and Rachel Hardin as irrevocable beneficiaries until such time as she no longer has a child support obligation for either child. Further, Karen Lofgren shall cooperate in providing Todd Hardin, through counsel, all information and consents necessary to obtain information from Karen Lofgren's 401(a) and 403(b) administrators and to insure that said funds are protected and restrained as set forth above.

On January 12, 2016, Judge Johnson made the following ruling regarding Ms. Lofgren's life insurance policy: "Now, with regard to the life insurance. I didn't make it a major issue in this case, but it was raised, and I think it's important. I asked the questions, by the way, about the assets because it was evasive what Ms. Lofgren's total assets really are. And that's important, because I've been asked to allocate attorney's fees and I've been asked to deal with this particular life insurance policy. There does need to be a set-aside sufficient to cover the balance of the child support owed one way or another. And if that

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needs to be either through a life insurance policy, that's one way to do it. But if it's done through taking money out and put it in trust for the kids until such time as the child support provisions are gone, that's another way to do it. I'll leave it to Counsel. But I do think that somehow that has to be protected."

f. **Bad Faith:** "I really don't find that either party proceeded in bad faith. Mother is not here trying to be onerous or difficult or mean to the children or mean to their father. The evidence didn't support that. She's trying to have contact with her kids. She may be putting herself a little bit first. Maybe that's what makes us good parents sometime, we want to be with our children. But I don't think it's in bad faith. Therefore, she's not intransigent. I don't see that here. I don't see those kind of problems here. Nor do I find bad faith under RCW 26.09.260 by either parent. This is not the case at all. Consequently, award of attorney fees under that concept will not be done. It doesn't appear to me that when I look at the relative ability to pay, even though father has got the lion's share; oh, my gosh, $100 a month, that barely buys cereal for the children. He's taking on the lion's share. I understand that. On the other hand, mother's resources are quite severely limited. I don't have access, I think counsel is correct, to the funds that are currently in her retirement account. They're there for her when she retires for good reasons, retire when she's eligible to receive them. But in any event, I'm not going to award attorney fees to either party."

g. **Judgment Against Karen Lofgren for Expert Witness Fees and Costs Paid by Todd Hardin and GAL Fees Paid by Todd Hardin:** On January 7,

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2016 Ms. Lofgren, through her attorney, filed a Motion to Shorten Time and Motion for a Continuance of the January 11, 2016 trial date because their expert witness, Sonja Ulrich, was no longer available to testify at trial or provide further expert witness services and Ms. Lofgren wanted additional time to hire a new expert witness. Petitioner opposed this motion and filed a Response Declaration and Cost Bill and Declaration on January 7, 2016 which requested $5,817.90 in attorney's fees for the fees and costs expended by Petitioner's attorney in preparing for and taking Ms. Ulrich's deposition and preparing for her trial testimony. On January 8, 2016, Judge Johnson denied Ms. Lofgren's motion for continuance and ordered that Ms. Ulrich should remain Ms. Lofgren's expert witness and could provide trial testimony via video, Skype, or in person. Judge Johnson further ordered that Petitioner's request for attorney's fees should be reserved for trial. The January 8, 2016 order also required that each party pay $200 into the Clerk of the Court toward the Guardian ad Litem's $400 trial retainer.

On January 12, 2016, Judge Johnson made the following findings regarding Petitioner's request for attorney's fees: "The expert witness costs of $5,817.90 and the GAL fees paid by the father of $200, will both be borne by the mother, in the form of a judgment. With 12 percent thereon after any judgment is executed; that's the statute. The Court makes an allocation of attorney fees, as I understand it, based upon the equity of the circumstances. And I do find the equities are that the mother should be paying for these costs. She's the one that

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contacted the expert, who turned out from what I read had very little to add to this case. Cost a great deal of money for the father to go through to take depositions to prepare for trial. It's not necessarily her fault that she's not here. I don't know. Her letter was very shallow in telling me really why she shouldn't be excused. But beyond that, in any event, the father should not have to, and ultimately, the children should not have to bear this expense. Comes out of their pocket. This is something that was brought about by the mother. I think the equities do favor mother paying that expense, as well as the guardian ad litem expenses in this case."

2.2 Modification Under RCW 26.09.260(1),(2)

Does not apply.

2.3 Modification or Adjustment Under RCW 26.09.260(4) or (8)

Does not apply.

2.4 Adjustments to Residential Provisions Under RCW 26.09.260(5)(a) and (b)

The custody decree/parenting plan/residential schedule should not be adjusted because none of the statutory reasons in RCW 26.09.260(5)(a) and (b) apply.

2.5 Adjustments to Residential Provisions Under RCW 26.09.260(5)(c), (7), (9)

This section only applies to a person with whom the child does not reside a majority of the time who is seeking to increase residential time.

2.5.1 Parent subject to limitations under RCW 26.09.191(2) or (3)

The residential time of Karen Lofgren is subject to limitations. This parent has not demonstrated a substantial change in circumstances specifically related to the basis for the limitations.

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2.5.2 Parent Required to Complete Evaluations, Treatment, Parenting or Other Classes

Karen Lofgren is not required under the existing parenting plan/residential schedule to complete evaluations, treatment, parenting or other classes.

2.5.3 Adjustment to Residential Provision Under RCW 26.09.260(5)(c)

The custody decree/parenting plan/residential schedule should not be adjusted because none of the statutory reasons in RCW 26.09.260(5)(c) apply.

2.6 Adjustments to Nonresidential Provisions Under RCW 26.09.260(10)

The following non-residential aspects of the parenting plan/residential schedule should be adjusted because there is a substantial change of circumstances of either party or of the children and the adjustment is in the best interest of the children:

Other: The Court finds based upon the testimony and preponderance of the evidence that [The Relationship between the mother and children] is NOT EXISTING WITH THE MOTHER ~~there is no current relationship between the mother and children.~~ AT THIS POINT OTHER THAN A MEMORY AND SOME CONTACT WITH RELATIVES. Therefore the Court makes the additional finding under paragraph 2.2 of the Final Parenting Plan of "the absence or substantial impairment of emotional ties between the parent and child." The Court further finds that there is no evidence of a sexual assault ~~between mother and children~~ and therefore the finding under paragraph 2.1 should delete any reference to a "sexual assault". The finding should be modified to read: "A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault which causes grievous bodily harm or the fear of such harm."

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2.7 Substantial Change in Circumstances

(Complete this part if a modification or adjustment is based on paragraphs 2.2, 2.4, 2.5.1, 2.5.3 or 2.6).

The following substantial change has occurred in the circumstances of either party or of the children:

The April 24, 2013 Final Parenting Plan stated the following in paragraph 3.13:

> *"1. The respondent/mother was convicted of solicitation to commit murder of the petitioner/father, second degree, on January 25, 2013, under Pierce County cause no. 12-1-00662-0, was sentenced to 165 months in prison, and was ordered to have no contact with the petitioner/father and the minor children. A copy of the Judgment and Sentence and the No Contact Orders regarding the children are attached hereto.*
>
> *2. ONLY the provisions regarding the respondent/mother's contact with the children may be reviewed if the provisions of the no contact orders regarding the children entered under cause no. 12-1-00662-0 on 1/25/2013 are terminated."*

The Court of Appeals vacated the lifetime no contact order between the mother and the children.

This Order with Findings, and the Final Parenting Plan entered concurrently herewith are entered after trial on Mother's Petition for Modification and reflect the substantial change in circumstance due to the Court of Appeals vacating the lifetime no contact orders between Ms. Lofgren and the children.

The lifetime no contact order between Karen Lofgren and Todd Hardin entered under Pierce County Cause No. 12-1-00662-0 remains in full force and effect.

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2.8 Protection Order

Does not apply.

III. ORDER

***It is Ordered*:**

A. Ms. Lofgren's Petition to modify the April 24, 2013 Final Parenting Plan is denied with the exception of the modified language in paragraph 3.13 (1), (2), and (3) of the Final Parenting Plan filed contemporaneously as set forth herein.

B. Petitioner Todd Hardin is awarded a judgment against Respondent Karen Lofgren in the amount of $5,817.90 with interest thereon at 12% per annum, representing expert witness fees and costs for deposition and trial preparation.

C. Respondent Karen Lofgren shall pay 100% of the Guardian ad Litem fees and costs incurred herein. Petitioner Todd Hardin is ~~awarded a judgment against Respondent Karen Lofgren in the amount of $200 with interest thereon at 12% per annum, representing his share of the Guardian ad Litem's trial retainer.~~ being reimbursed from The Clerk of the Court in the amount of $200.00 being The sum he previously deposited.

D. **Life Insurance:** Regarding Respondent Karen Lofgren's obligation to maintain her Northwestern Mutual Life Insurance policy pursuant to the Final Order of Child Support entered on April 24, 2013, page 10, paragraph 3.23, lines 15-16, shall be deleted and the following provisions shall be ordered: Karen Lofgren shall name her children as irrevocable beneficiaries of all

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retirement and bank accounts until she no longer has a court ordered obligation for child support for the children, and at no time shall the aggregate amount of these accounts be less than Ms. Lofgren's court ordered support obligation in total to include any post secondary education obligations. Ms. Lofgren shall provide written proof of the beneficiary status and account balances annually on or before ~~March 1~~ April 15th of each year, commencing ~~March 1~~ April 15th, 2016 through Todd Hardin's designated agent.

OR:

Karen Lofgren shall be restrained from encumbering, withdrawing, or liquidating funds held in her Charles Schwab account, her Transamerica account, her Vanguard account and funds related to her 401(a) and 403(b) Multicare Health System benefits, except for necessary and ordinary living expenses or expenses allowed per court order, and shall be further ordered to name Leah and Rachel Hardin as irrevocable beneficiaries on any account held in Karen Lofgren's name or for her benefit, to include investment and tax deferred retirement accounts, until such time as Karen Lofgren no longer has a court ordered financial obligation for either child. At no time shall the aggregate amounts of these accounts be less than Ms. Lofgren's court ordered financial obligation for her children to include post secondary education expenses. Karen Lofgren shall provide annual written proof of the account balances and beneficiary designation on or before April 1 of each year, through Todd Hardin's designated agent, so long as she has a financial obligation toward her children.

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FILED
IN COUNTY CLERK'S OFFICE
A.M. MAR 25 2016 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk

Dated: 3/25/2016

Judge **Garold Johnson**

Presented by:

3.25.16
Lynn Johnson, WSBA #11864 Date
Attorney for Petitioner

3/25/16
Todd Hardin, Petitioner Date

Approved by:

March 25, 2016
Sara Humphries, WSBA #36499 Date
Attorney for Respondent

Karen Lofgren, Respondent Date

Frances Kevetter, WSBA #13145 Date
Guardian ad Litem

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ZARAGOZA NOVOTNY PLLC

November 18, 2016 - 2:28 PM

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